porting & Disclosure Act of 1959. The complaint further alleges that the placing of plaintiff's name on the unfair list jeopardized his income and livelihood and that the plaintiff has suffered damage and would continue to suffer irreparable damage; that the plaintiff was placed upon AGVA's unfair list by reason of a debt found to be due under an arbitration award from the plaintiff to an employer and that the arbitration proceeding was illegally conducted; an injunction and damages are prayed. Simultaneously a motion was made by the plaintiff for a temporary injunction. On the return date of the temporary injunction the defendant below moved for dismissal of the complaint upon a notice of motion, affidavits and exhibits, relying principally on the fact that the plaintiff had failed to exhaust remedies within the union, required by its constitution, pursuant to U. S. C. A. Sec. 411(a)(4). The moving papers on the motion to dismiss established that AGVA had a rule requiring compliance by all its members with arbitration awards; that the rules requiring compliance with such awards, and with the provisions of collective bargaining agreements and of contracts with booking agents, were part of a long standing plan and policy to achieve stability in the variety field of entertainment which had previously been a field of great abuse by employers, agents and performers, particularly in the non-performance of contractual obligations; that the claim of the employer out of which the arbitration proceeding arose was for violation by plaintiff of the collective bargaining agreement between the union and the employer and of the plaintiff's agreement of employment with said employer; that AGVA made substantial efforts to settle the dispute prior to litigation to the benefit of the plaintiff; that the plaintiff was at all times represented by counsel; that the plaintiff made, with the advice of counsel, an agreement to arbitrate under the laws of California with the employer; that each of the parties thereto designated an arbitrator and that the two

arbitrators designated a third arbitrator and that the panel of three conducted full hearings at which minutes were taken; that as a result of the hearings the arbitrator designated by the plaintiff himself and the arbitrator appointed by the plaintiff's and employer's designees resolved the dispute against the plaintiff and in favor of the employer, the designee of the employer abstaining; that the hearings were fairly conducted and were not conducted by AGVA as alleged in the complaint and moving papers, nor were they participated in by AGVA except that an AGVA representative was called as a witness and testified briefly and impartially; that plaintiff refused to abide by the award of the arbitrators and notified AGVA that he intended to appeal the award to AGVA's National Board; that plaintiff was notified that the award of arbitrators could not be appealed to AGVA, and that plaintiff then notified AGVA that he would move within the 90 day period allowed by California law to vacate the award; that AGVA, which had demanded compliance with the award, took no action until the full 90 day period for such application by the plaintiff had expired, and thereafter, upon notice to the plaintiff, placed his name on the unfair list.

The constitution of AGVA provides, that a "claim" embraces any "demand, action, suit or other proceeding, either at law or in equity for whatever cause or reason arising, from the action of the association or its omission or neglect to act, or the action of any of its representatives or their omission or neglect to act, * * *"

The constitution further provides that the exclusive remedy of a member who has or asserts a claim shall be a request for a hearing before the National Board of Directors or Executive Committee in connection with the claim, which shall be heard within 30 days after filing, and that the Board or Executive Committee must make a final determination of the complaint within 30 days after the hearing.

The District Court, Dimock, J. treated the motion to dismiss the complaint as a motion for summary judgment, and solely upon the basis of the exhaustion of remedies requirement of Section 411(a)(4), on October 4, 1960, granted defendant's motion for summary judgment and dismissed the complaint. The plaintiff's motion for a temporary injunction was dismissed as moot.

Upon appeal, the U. S. Court of Appeals for the Second Circuit, on January 13, 1961, reversed the order of the District Court dismissing the complaint and remanded the case with instructions to grant the temporary injunction requested by the plaintiff-appellant. The theory of the Circuit Court was that the provisions of Sec. 411(a)(4) requiring exhaustion of remedies were not mandatory, and that authority to require the same, under the language of the statute, was vested in the Court rather than in the constitution and by-laws of the labor organization.

Reasons for Granting the Writ

Section 411(a)(4) of U.S.C.A. Title 29 provides that the right of any member of a labor organization to institute an action in any court shall not be limited,

> "*Provided*, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a 4-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof: • • •"

The Circuit Court construed the words "may be required" as meaning that the aggrieved member may be required *by the Court* to exhaust internal remedies of less than four months' duration. The Circuit Court in con-

struing the words of the proviso quoted above relied solely upon exeerpts from the Congressional record of statements by Representative Griffin and Senator (now President) Kennedy.

Petitioners believe that the Circuit Court misconstrued these remarks quoted from the Congressional record and failed to consider the language of the statute itself prior to seeking extrinsic assistance in its construction.

The Supreme Court has held that certiorari may be granted where there is a strong possibility of error involving a novel question of continuing importance, which may become involved in numerous cases, and numerous decisions of district courts are in disagreement with the Court of Appeals, so that an early and definitive ruling becomes desirable; and that the foregoing is particularly true where review by the Supreme Court may result in a reduction in the burden of litigation, and where a question of the jurisdiction of the Federal Courts is involved, even though the determination below is not final.

U. S. v. *Powell*, 330 U. S. 238 (1946); *U. S.* v. *Standard Oil Company*, 332 U. S. 301, 302, N. 2 (1946); *U. S.* v. *Ruzicka*, 329 U. S. 287 (1946); *Bruner* v. *U. S.* 343 U. S. 112 (1952); *Land* v. *Dollar*, 330 U. S. 731, 734 N. 2 (1947); *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U. S. 682, 685, N. 3 (1948); *U. S.* v. *Constantine*, 296 U. S. 287 (1935); *Shapiro* v. U. S. 335 U. S. 1. 4 (1948).

Petitioners believe, for reasons which will be stated below, that the Circuit Court was in error, and that a failure by the Supreme Court to review the decision of the Circuit Court will result in an erroneous jurisdictional and substantive rule being continued in the law, on a novel matter of great importance, in which there is substantial conflict in Court decisions, which will be involved in numerous cases in the Federal District Courts greatly increasing the burden of litigation. This is one of the rare cases in which, although there is not yet any conflict between two

Circuits, an early and definitive ruling by the Supreme Court will be of the utmost significance in the administration of a statute concerning a matter of great importance.

It is submitted that the Circuit Court erred in respect to both questions presented as set forth at page 2 above.

I. Prior to the decision of the Circuit Court in the instant case all cases coming before District Judges construed Section 411(a)(4) as barring any action by a member of a labor organization prior to the exhaustion of reasonable remedies not in excess of the 4-month statutory period:

Smith v. *General Truck Drivers*, 181 Fed. Sup. 14 (1960), in which a disciplined union member sued relying upon Sec. 411(a)(5), as the instant case; the Court dismissed the complaint upon motion under Sec. 411(a)(4) holding specifically, at page 18, that the proviso was unconditional, and paraphrasing the idea that permitting the exhaustion of remedies requirement to be ignored upon a mere assertion that the invocation of internal remedies might be futile would be a "fantastic" contention.

In *Johnson* v. *United Mine Workers, District 50*, 186 Fed. Sup. 96 (1960) the Court cited the *Smith* case, *supra*, and dismissed the complaint on jurisdictional grounds, holding that by reason of Section 411(a)(4), the federal question did not arise until the 4-month period for exhaustion of internal remedies had expired.

The same holding in *Flaherty* v. *United Steel Workers*, 46 LRRM 2483 (1960) U.S.D.C., So. Dist. Calif., 6/9/60, not officially reported, on jurisdictional grounds.

It was after the decisions in the three cases cited above that Judge Dimock dismissed the complaint in the instant case, so that four District judges had construed Section 411(a)(4) as a complete bar to an action prior to the decision of the Circuit Court herein.

Section 411(a)(4) is set forth in a single sentence containing two provisos. The subject of the sentence are the words "labor organization"; the first proviso continues stating that members "may be required to exhaust reasonable hearing procedures". It is submitted that the four District judges read the language correctly in finding the statute to mean that it is the labor organization which may require exhaustion of remedies in its constitution and by-laws, and not the Court as held by the Court of Appeals.

Historically, it has always been the union constitution which "required" the exhaustion of internal remedies; the constitutional requirements were honored by the courts in the exhaustion of remedies doctrine, only where the union constitution provided internal remedies. In their ordinary sense, therefore, the words "may be required" in the first proviso to Sec. 411(a)(4) were presumed by the District Courts to refer to union constitutional requirements. It is submitted that a specific statutory direction would be necessary to change the accepted usage of the words so that the exhaustion might be "required" by the courts; if the requirement were to be at the court's discretion only, presumably the court could require exhaustion even where the union constitution did not; such an interpretation is certainly contrary to the entire history of the doctrine of exhaustion and to the statutory history, *infra*.

Furthermore, since the proviso speaks of exhaustion before institution of legal *or administrative* proceedings the Circuit Court's construction would require each Administrative Agency to develop its own body of substantive law, as to when exhaustion would be required by it; certainly this result was not intended by the Congress in the absence of a specific statutory direction.

The Court of Appeals relied principally upon two excerpts from the Congressional record by Representative Griffin and Senator Kennedy, which we respectfully suggest do not support, in context, the Court's view, both

inserted in the record in September of 1959 after the Conference Committee had agreed upon the bill. However, the reports made to the House and the Senate respectively by the two legislators followed extensive debates concerning exhaustion of remedies on a draft of the bill identical with the statute as enacted except for the substitution of a 4 month waiting period for a 6 month period. We submit that the prior statutory history when read together with the statements of Rep. Griffin and Sen. Kennedy establish that the Congress intended the four month period of the statute to be an absolute bar to litigation and the courts thereafter to have discretion to require further exhaustion of remedies depending upon the circumstances of the case.

Thus, in Congressional Record—House, August 11, 1959, at page 15530, at column 3, Rep. Griffin states that the Committee bill *requires* a union member to exhaust internal union procedures for 6 months before instituting proceedings. He states as the reason for reducing the period to 4 months in the substitute bill was the fact that the Taft-Hartley law prescribes a 6-month statute of limitations which might result in loss by members of access to remedies under the National Labor Relations Act.

In Daily Congressional Record—House, July 27, 1959 Congressman Landrum stated at page 13087, first column, that the bill introduced by himself and Congressman Griffin that day containing the so-called "bill of rights", "would require that union members 'exhaust reasonable remedies' within a 6-month period, which are available under the union's constitution and by-laws. *Only then can the member subsequently institute a civil action for relief* from infringement of his rights". • • • "The bill we propose as a substitute would permit a member to seek immediate redress of his basic rights in the courts after 4-months without the further delaying and dilatory route of exhausting union procedures" (emphasis added).

Sen. McClellan who drafted the original bill of rights sections, stated at Congressional Record—Senate April 22, 1959, page 6479:

"I do not care to argue about whether the period should be 3 months, 4 months, or 6 months; but certainly some date must be set. I want the date that is set to be a reasonable and proper one; but I do not want the period which is prescribed to be so arbitrarily long that it will deny union members what they are entitled to, and will cause them to wait an unjust length of time, and thus will amount to obstruction, rather than the provision of a proper opportunity for them to exercise their rights."

The entire tenor of Sen. McClellan's discussion is that the waiting period, whatever length it should be, is mandatory.

Representative Thompson also discussed the exhaustion of remedies provision at Congressional Record—House, August 11, 1959, Pages 15536-15537. Representative Thompson argued against the exhaustion of remedies provision upon the ground that the 4-month limitation was not sufficient to allow complete exhaustion of remedies before the permissible resort to judicial proceedings, so that it deprived labor organizations and members of the final appeal to the members in convention. It is an assumption throughout the debate that the 4-month period requirement is an absolute bar.

See also the remarks of Representative Rhodes in Daily Congressional Record—House, Pages 14493-14494, August 13, 1959 and remarks of Representative McCormick on the same date at pages 14494-14496, which assume the exhaustion period to constitute an absolute bar, Representative Rhodes stating in support of the provision at Page 14494, first column:

"What does this so-called killer bill say? It says that you may sue the union after you have exhausted all the rights and remedies under the union constitution and by-laws or after the expiration of 4-months, whichever is the earlier."

It is submitted that because of the foregoing remarks, reports and debates it is quite clear that both the Senate and the House viewed the 4-month period, at the time the bills were passed and prior to conference, as an absolute bar. Further exhaustion of internal remedies might later be required by the Court. It is respectfully submitted that read in the light of the foregoing there is absolutely no inconsistency between this view and the statements made by Representative Griffin at 105 Daily Congressional Record App. A7915 (Sept. 4, 1959) and Senator Kennedy at 105 Daily Congressional Record 16414 (September 3, 1959), excerpts of both of which are printed in footnote 2 of the decision of the Circuit Court of Appeals herein. The statement of Representative Griffin is set forth in full, but in order to remove any possible doubt as to the intention of Senator Kennedy, we here set forth the complete paragraph from which the Circuit Court quoted:

"Protection of the Right to Sue (Sec. 101(a)(4)

"The protection of the right to sue provision originated in the Senate bill and was adopted verbatim in the Landrum-Griffin bill except that the first proviso limiting exhaustion of internal hearing procedures was changed from 6 months to 4 months. The basic intent and purpose of the provision was to insure the right of a union member to resort to the courts, administrative agencies and legislatures without interference or frustration of that right by a labor organization. On the other hand, *it was not and is not the purpose of the law to eliminate existing grievance procedures established by union constitutions for redress of alleged violation of their internal governing laws.* Nor is it the intent or purpose of the provision to invalidate the considerable body of State and Federal court decisions of many years standing which require, or do not require, the exhaustion of internal remedies prior to court intervention depending upon the

reasonableness of such requirements in terms of the facts and circumstances of a particular case. So long as the union member is not prevented by his union from resorting to the courts, the intent and purpose of the 'right to sue' provision is fulfilled, and any requirements which the court may *then* impose in terms of pursuing reasonable remedies within the organization to redress violation of his union constitutional rights will not conflict with the statute. *The doctrine of exhaustion of reasonable internal union remedies for violation of union laws is just as firmly established as the doctrine of exhausting reasonable administrative agency provisions prior to action by courts.*" (Emphasis added.)

It is submitted that, as appears from the debates prior to conference, at which the substance of the section was not altered, both the Senator and the Congressman intended to overcome the criticism that the bill did not permit sufficient recourse to union procedures by pointing out that it was not the intention of the bill to deprive labor organizations of the right to settle their internal affairs even after the 4 month period, but that any member invoking judicial assistance after the 4 month period might still be subject to the rules of a union requiring exhaustion of reasonable remedies if the Court felt that the circumstances of the case did not require judicial intervention at that time, in accordance with the body of case law referred to in the Circuit Court's opinion.

The Circuit Court, it may be presumed, was concerned that the 4-month delay could result in grave injustices if union members were without any possible remedy during the period. It is suggested that the courts will find the desired flexibility for extreme cases in the requirement of the first proviso of Sec. 411(a)(4) that only "reasonable hearing procedures" be exhausted. A requirement of reasonableness is quite different from the Circuit Court's

interpretation which vests total discretion in Courts and administrative agencies as to the applicability of the proviso, in holding that exhaustion "may be required" only by them.

As the Circuit Court states it is a purpose of the exhaustion of remedies doctrine to stimulate labor organizations to take the initiative and provide corrective action within the union which would render a member's complaint moot, in the interest of conserving judicial resources. The doctrine laid down by the Circuit Court of Appeals will stimulate immediate resort to the courts in all cases and add to the burden of litigation upon the parties and the courts.

II. With respect to the second question presented above, we believe that the Court also erred in finding that the facts of this case warranted immediate judicial intervention. The theory of the Court of Appeals was that the internal remedies in the union constitution were of dubious application, and also that adequate relief could not have been accorded in the form of damages.

With respect to the internal relief available to the plaintiff, as stated above under the heading "Statement of the Case", the definition of the word "claim" in the union's remedial provision, Article XX, is exceedingly broad, and includes any action or proceeding, either at law or in equity for whatever cause arising. The Court of Appeals was concerned that this did not include claims like the plaintiff-appellant's below. The apprehension is entirely unwarranted in view of the union's own construction that it does, and the holding of the Supreme Court, New York County, in *La Monte* v. *Smith*, 45 LRRM 2007, N. Y. Co. Sup. Ct., 10/8/59, not officially reported, that the provisions are applicable to other than monetary claims.

With respect to the theory that injunctive relief was required because plaintiff-appellant below was an independent contractor and it would be difficult to measure

his damage, we submit that courts and juries award damages for loss of earnings by persons, whether they be employees or independent contractors, every day. If this were a personal injury action in which loss of earnings were required to be appraised by a court or jury, the court would have had no difficulty in finding damages adequate relief. It is difficult to understand the distinction since in the instant case it does not appear in the papers below that the petitioner herein is unable to answer in damages. Where damages afford adequate relief the injunctive remedy is inappropriate.

The foregoing is particularly true where resort to the courts for injunctive relief is also contrary to the statutory and judicial policy of exhaustion of prior remedies.

If injunctive relief is appropriate in this disciplinary case the burden of litigation will be immeasurably increased since possible loss of earnings is implicit in virtually all union disciplinary actions.

It is respectfully submitted that the Court of Appeals erred in failing to find upon the record as a whole a complete lack of equity in the position of the plaintiff-appellant below; the dispute arose out of a debt arising under a collective bargaining agreement between petitioner and a third party and a union form of personal engagement contract subject to the collective bargaining agreement; in the arbitration proceedings which followed, even the performer's own designee-arbitrator voted against him; he then failed to move to vacate the award within the statutory period allowed by California law and stubbornly refused to comply with a just and final award. The suggestion that petitioners should have advised the member of his right to a hearing when he mistakenly sought to appeal the arbitrator's award to AGVA is not appropriate, since at that time AGVA could not have known whether the member would comply, or move to vacate, or whether disciplinary action would eventually be required. When AGVA, believing that the arbitration pro-

ceeding constituted the required hearing, actually took action to enforce the award, which had become final after 90 days, it was pursuing a policy favored by the courts.

See:

United Steel Workers Union v. *American Manufacturing Co.*, 363 U. S. 564 (1960);
United Steel Workers Union v. *Warrior and Gulf Co.*, 363 U. S. 574 (1960);
United Steel Workers Union v. *Enterprise Wheel & Car Co.*, 363 U. S. 593 (1960).

Finally, the hearing procedures set forth in AGVA's Constitution, Article XX are most reasonable, the hearing being required within 30 days after filing of the claim and a decision being required within 30 days after hearing. Plaintiff could have had his hearing and determination within 60 days.

Conclusion

For the reasons stated above, it is respectfully submitted that this petition should be granted.

Respectfully submitted,

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APPENDIX

Opinion of United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 190—October Term, 1960.

(Argued November 16, 1960 Decided January 13, 1961.)

Docket No. 26548

GENE DETROY,

Plaintiff-Appellant,

v.

AMERICAN GUILD OF VARIETY ARTISTS, JOEY ADAMS, as its President and JOE SMITH, as its Treasurer,

Defendants-Appellees.

Before:

LUMBARD, *Chief Judge,*
WATERMAN and MOORE, *Circuit Judges.*

Appeal from summary judgment in the United States District Court for the Southern District of New York, Edward J. Dimock, J., dismissing complaint alleging a vio-

lation of §101(a)(5) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U. S. C. §411(a)(5).

Reversed and remanded.

HENRY M. KATZ, New York, N. Y., *for plaintiff-appellant.*

AARON BENENSON, New York, N. Y. (Harold F. Berg, Arnold R. Streit, and Mark K. Benenson, New York, N. Y., on the brief), *for defendants-appellees.*

LUMBARD, *Chief Judge*:

The appellant, manager and trainer of a troupe of chimpanzees with which he performs professionally under the name of the "Marquis Family" in theaters, night clubs, circuses, on television, and in motion pictures, instituted this proceeding under §102 of the Labor-Management Reporting and Disclosure Act of 1959, 29 U. S. C. §412, demanding injunctive relief and damages for an alleged violation of the procedural rights granted union members by §101(a)(5) of the Act, 29 U. S. C. §411(a)(5).[1] Upon a motion for summary judgment, the district court dismissed the complaint on the ground that under §101(a)(4) the plaintiff could bring no court action against a labor union without first exhausting the internal remedies provided by the union, and that in this case the defendant union had established reasonable procedures by its constitution where-

1. (5) Safeguards against improper disciplinary action.—No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

by claims against it by members could be heard within the four-month period permitted by the law.

The controversy between the appellant and the American Guild of Variety Artists, a labor union representing variety entertainers in the United States and Canada, arose out of a breach-of-contract claim made against the appellant by a resort hotel in Las Vegas, Nevada. After failing to settle the dispute by negotiation, the AGVA requested the parties to submit it to arbitration, which they did. A panel of three, one selected by each of the parties to the dispute and the third chosen by the two so designated, met in Los Angeles County, California, on January 12, 1960, and decided in favor of the hotel. The union then advised the appellant that if he did not abide by the award, it would place him on the "National Unfair List" appearing in its monthly periodical "AGVA News." The appellant replied that he intended to move to vacate the arbitration award in the California courts, but never began any such proceedings. When the three months provided by California law for vacating arbitration awards had elapsed, the union proceeded to publish the appellant's name in the August 1960 issue of the periodical under a heading which read as follows:

"NOTICE TO MEMBERS.

The rules require that you may not work for any employer, agent, booker or third party who is marked 'UNFAIR' by AGVA. Violation of these rules subjects you to disciplinary action.

NOTICE TO AGENTS

• • • You are not authorized to book AGVA members in unfair establishments or book performers not in good standing in AGVA. Violation of rules subjects you to revocation of your franchise."

The appellant then began this proceeding in the Southern District of New York, claiming that the listing amounted to disciplinary action within the meaning of §101(a)(5) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U. S. C. §411(a)(5), and that he was, therefore, entitled to specific written charges, a reasonable time to defend, and a full and fair hearing before having his name placed on the list.

The appellant did not, however, seek to utilize the procedure made available by Article XX of the Constitution of the AGVA. This article, entitled "Claims of Members," establishes procedures whereby claims asserted against the union are heard and determined by its Board or Executive Committee. Thus, the first issue before us now is whether the proviso in §101(a)(4), which protects the right of a union member to sue his union, "provided, that any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof," required of the appellant in this case that he first have recourse to the internal procedures established by the union's constitution. The exhaustion proviso of §101(a)(4) does not appear in §102, which grants members who claim that their rights under §101 have been infringed a federal forum in which to litigate their disputes with the union. It might also appear from the rejection by the House of Representatives of H.R. 8342, the bill originally reported out of the Committee on Education and Labor, which explicitly provided for exhaustion of internal remedies in §102, that Congress did not mean to have the exhaustion doctrine apply to the rights granted by §101, except where, as in the case of the right to sue, it was expressly provided. However, the broad language of the proviso in §101(a)(4) includes suits instituted against labor

unions in any court on any claim. Absent a clear directive by Congress, the policy formulated over a course of time by courts reluctant to interfere in the internal affairs of private organizations should not be superseded. We hold, therefore, that the provision in §101(a)(4) applies, as well, to suits brought in the federal courts for violations of the rights secured by §101.

Judge Dimock in this case read §101(a)(4) as imposing upon the union member an absolute duty to exhaust union remedies before applying to the federal courts. The legislative history of the section indicates, however, that Congress had no intention of establishing such a rule.[2]

2. For example, one of the authors of the bill passed by the House, Representative Griffin, expressed a clear opinion on the question. He said:

"The proviso which limits exhaustion of internal remedies is not intended to impose restrictions on a union member which do not otherwise exist, but rather to place a maximum on the length of time which may be required to exhaust such remedies. In other words, existing decisions which require, or do not require, exhaustion of such remedies are not to be affected except as a time limit of 4 months is superimposed. Also, by use of the phrase 'reasonable hearing procedures' in the proviso, it should be clear that no obligation is imposed to exhaust procedures where it would obviously be futile or would place an undue burden on the union member." 105 Daily Cong. Rec. App. A7915 (Sept. 4, 1959).

The statement made by Senator Kennedy, who introduced the original bill to which §§101-105 were added as amendments on the Senate floor, is also representative of the attitude taken by those who instituted the legislation. He said:

"Nor is it the intent, or purpose of the provision to invalidate the considerable body of State and Federal court decisions of many years standing which require, or do not require, the exhaustion of internal remedies prior to court intervention depending upon the reasonableness of such requirements in terms of the facts and circumstances of a particular case. * * * The doctrine of exhaustion of reasonable internal union remedies for violation of union laws is just as firmly established as the doctrine of exhausting reasonable administrative agency provisions prior to action by courts." 105 Daily Cong. Rec. 16414 (Sept. 3, 1959).

The statute provides that any member of a labor organization "may be required" to exhaust the internal union remedies, not that he "must" or "is required to" exhaust them. When read in light of the statements made on the floor of Congress by the authors of the statute, it appears clear that the proviso was incorporated in order to preserve the exhaustion doctrine as it had developed and would continue to develop in the courts, lest it otherwise appear to be Congress' intention to have the right to sue secured by §101 abrogate the requirement of prior resort to internal procedures. In addition, the proviso dictated an outside limit beyond which the judiciary cannot extend the requirement of exhaustion—no remedy which would require proceedings exceeding four months in duration may be demanded. We therefore construe the statute to mean that a member of a labor union who attempts to institute proceedings before a court or an administrative agency may be required *by that court or agency* to exhaust internal remedies of less than four months' duration before invoking outside assistance.

Section 102, under which the appellant instituted his proceeding, provides for enforcement by federal courts of rights secured by federal law. We are not in this case, therefore, bound by the doctrine of exhaustion as developed in the New York, Nevada, or California courts with respect to suits against unions brought in the courts of those states by union members. In enforcing rights guaranteed by the new statute, whether or not similar rights would be enforced under state law by state courts, the federal courts may develop their own principles regarding the time when a union's action taken in violation of §101 is ripe for judicial intervention. Cf. *Holmberg* v. *Armbrecht*, 327 U. S. 392 (1946); *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173, 176-77 (1942). The rules formulated by various state courts may suggest helpful avenues of approach, cf.

Textile Workers Union v. *Lincoln Mills*, 353 U. S. 448, 457 (1957), but the authority granted to the federal courts by Congress to secure the rights enumerated in §101 of the 1959 Act is accompanied by the duty to formulate federal law regarding a union member's obligation to exhaust the internal union remedies before seeking judicial vindication of those rights.

If we look to the substantial body of state law on the subject, we find that the general rule requiring exhaustion before resort to a court has been almost entirely swallowed up by exceptions phrased in broad terms. See Annot., 168 A. L. R. 1462 (1947); Summers, *Legal Limitations on Union Discipline*, 64 Harv. L. Rev. 1049, 1086-92 (1951). Rather than decide whether exhaustion is proper by determining whether the union's action can be characterized as "void" (e.g., *Tesoriero* v. *Miller*, 274 App. Div. 670, 88 N. Y. S. 2d 87 (1949)) or as "affecting property rights" (e.g., *Local No. 65 of Amalgamated Sheet Metal Workers* v. *Nalty*, 7 F. 2d 100 (6th Cir. 1925)), we believe it preferable to consider each case on its own facts.

The Congressionally approved policy of first permitting unions to correct their own wrongs is rooted in the desire to stimulate labor organizations to take the initiative and independently to establish honest and democratic procedures. See Cox, *The Role of Law in Preserving Union Democracy*, 72 Harv. L. Rev. 609, 615 (1959). Other policies, as well, underlie the exhaustion rule. The possibility that corrective action within the union will render a member's complaint moot suggests that, in the interest of conserving judicial resources, no court step in before the union is given its opportunity. Moreover, courts may find valuable the assistance provided by prior consideration of the issues by appellate union tribunals. See Summers, *The Law of Union Discipline: What the Courts Do in Fact*,

70 Yale L. J. 175, 207 (1960). Congress has provided a safeguard against abuse by a union of the freedom thus granted it by not requiring exhaustion of union remedies if the procedures will exceed four months in duration. But in any case, if the state of facts is such that immediate judicial relief is warranted, Congress' acceptance of the exhaustion doctrine as applied to the generality of cases should not bar an appropriate remedy in proper circumstances.

The affidavits and exhibits submitted in the district court on the motion for summary judgment establish that the only hearing given the appellant before his name was placed on the National Unfair List was that of the arbitration proceeding. The union was not a party to the arbitration, and the issue decided by the arbitrators was not whether the appellant should be disciplined by the union but whether he owed an obligation to an employer with whom he had contracted. It is undisputed that no hearing was held in which the appellant could respond to the union's intention of taking disciplinary action. Quite clearly, a hearing in which some liability between a union member and a third party is determined is not the type of hearing demanded by §101(a)(5). At no time was the appellant given the opportunity of arguing before the union's hearing board that placing him on the Unfair List exceeded the powers granted to the union by its constitution, nor could he raise other mitigating circumstances in response to an expressed intention to place his name on such a list. The facts on their face, therefore, reveal a violation of the rights guaranteed union members by §101(a)(5). If the question before us were whether the union's constitution authorized the listing of the appellant's name on an unfair list after a hearing with due procedural safeguards, a union tribunal might provide some insight to aid our decision. But no prior

consideration by such a tribunal is necessary or helpful on the question whether the treatment of the appellant violated §101(a)(5).

In addition, the particular form of the disciplinary action makes it difficult for the union to provide an adequate remedy. The appellant, from the date his name appeared on the list, was virtually barred from employment by those dealing regularly with the AGVA. Since he is an independent contractor whose weekly pay varies according to the terms of the contracts he signs with his employers, the precise extent of damages suffered by the appellant as a result of the listing can never be determined. Even were the union to permit him to present his case before a review board, the board could merely order his name removed from the list and, in order to provide a more satisfactory remedy, award as damages for the period during which he was barred from employment a sum which, at best, could only be an approximation. It appears unlikely that Congress intended that its expressed desire to provide minimum safeguards against arbitrary union discipline be avoided by the union's imposition of a sanction which has its most severe effect within a four-month period, if the consequences of such action cannot be precisely measured in order to assess damages. Early judicial intervention providing an adequate remedy by means of the court's power to enjoin further violations is therefore proper. Moreover, when it is difficult to assess damages it is more likely that the aggrieved union member will ultimately appear in a federal court to press a damage claim. Under New York law, which might apply in this case since the headquarters of the union are in New York and the appellant's membership contract might, therefore, be deemed to have been concluded in New York, the union might be free of liability in damages for the action of one of its offi-

cers in placing the appellant's name on the National Unfair List. See, e.g., *Bingham* v. *Bessler*, 10 App. Div. 2d 345, 199 N. Y. S. 2d 681 (1st Dept. 1960); but see *Madden* v. *Atkins*, 4 N. Y. 2d 283 (1958). Only the federal court, therefore, would be able to provide a damage remedy, because of §101(a)(5), for the effects of the disciplinary step taken without the minimum procedural safeguards. If it is probable that the union will grant no award or that its award will be so speculative that court proceedings will be instituted even after the remedies are exhausted, not even the policy calling for exhaustion in order to conserve judicial resources applies.

Moreover, it is by no means clear that the union's own rules afforded the appellant a remedy within the organization. The section of the union's constitution which relates to disciplinary proceedings (Article XVII) authorizes fines, censure, suspension, or expulsion pursuant to a hearing and determination made by the Board or Executive Committee of the union. An appeal may be taken from such a decision to the next following annual or special convention of the union. No provision is made anywhere for any proceeding either before or after the printing of a member's name on the National Unfair List. The union maintains that Article XX of its Constitution, entitled "Claims of Members," provides a means for reviewing the correctness of this sanction. The constitution's separate provision for disciplinary proceedings in Article XVII, however, suggests that Article XX was not intended to provide an alternate procedure for review of a union's sanctions against its members, but merely to grant a forum for other monetary claims against the union. Moreover, after the arbitration award the appellant notified the Western Regional Director of the union by telegram that he intended "appealing to the National Board," and was told in a reply

letter that "the decision of the arbitrators is final and * * * you cannot appeal this to the National Board of AGVA." Although this response referred not to the disciplinary measure but to the arbitrators' decision, neither that letter nor the later notification that he was being placed on the National Unfair List notified the appellant that any specific review procedure was available. Thus, an attempt to proceed under Article XX might not have proved futile, but it would have been quite uncertain. When asserting what is clearly a violation of a federal statute, a union member should not be required to first seek out remedies which are dubious. Only resort to those expressly provided in the union's constitution or those clearly called to his attention by the union officials should be demanded of him.

Taking account of the declared policy favoring self-regulation [illegible]s, we nonetheless hold that where the internal union remedy is uncertain and has not been specifically brought to the attention of the disciplined party, the violation of federal law clear and undisputed, and the injury to the union member immediate and difficult to compensate by means of a subsequent money award, exhaustion of union remedies ought not to be required. The absence of any of these elements might, in light of Congressional approval of the exhaustion doctrine, call for a different result. The facts of this case, however, warrant immediate judicial intervention.

Nor can we agree with the union's claim that the listing of the appellant's name did not constitute discipline within the meaning of §101(a)(5). If a union such as the AGVA undertakes to enforce the contracts made by its members with employers, it does so because such enforcement is to the ultimate benefit of all the members, in that it promotes stability within the industry. A breach of contract or a refusal to abide by an arbitration award,

therefore, is not damaging merely to the employer but to the union as well, and the union's listing of those of its members who do violate their contracts is an act of self-protection. In thus furthering its own ends the union must abide by the rules set down for it by Congress in §101(a)(5), and any member against whom steps are taken by the union in the interest of promoting the welfare of the group is entitled to these guarantees.

In passing on the motions for summary judgment and for a temporary injunction, the district court had before it only the complaint and the affidavits of the appellant and various officers of the union. The undisputed facts of the case require that a temporary injunction issue ordering the union to remove the appellant's name from its Unfair List where it is now retained in apparent violation of §101(a)(5).

We reverse the order of the district court dismissing the complaint and remand the case with instructions to grant the temporary injunction requested by the appellant.

Appendix

Opinion of the United States District Court for the Southern District of New York

#677

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

GENE DETROY,

Plaintiff,

against

AMERICAN GUILD OF VARIETY ARTISTS, JOEY ADAMS, as its President and JOE SMITH, as its Treasurer,

Defendants.

MEMORANDUM

DIMOCK, D.J.

This is a motion by defendant for summary judgment. The action is one by a variety entertainer against defendant American Guild of Variety Artists, a labor union whose membership is made up of such variety entertainers. Plaintiff seeks an injunction against the maintenance of his name upon a so-called unfair list of variety entertainers. The effect of having a performer's name upon such a list is practically to preclude him from obtaining engagements. Plaintiff's name was put on the unfair list because of non-payment of an arbitration award rendered against him in favor of a resort where he was under contract to perform.

The motion is based, first, upon the allegation that, although plaintiff asserts that jurisdiction of the action is conferred upon the court by section 102 of the Labor-Management Reporting and Disclosure Act of 1959, 29 U. S. Code §412, the complaint is not one included within the purview of the provisions of section 101(a)(5) of said Act, and second, upon the ground that plaintiff failed to exhaust his remedies within the Union as required by the constitution of the Union pursuant to authority contained in section 101(a)(4) of the Act.

The action is clearly one of which the court is given jurisdiction by Section 102 of the Act which provides that any person whose rights secured by the provisions of the title have been infringed by any violation of the title may bring a civil action in a district court of the United States. The title referred to is known as the Bill of Rights of Members of Labor Organizations.

Section 101(a)(5) provides:

> "(5) SAFEGUARDS AGAINST IMPROPER DISCIPLINARY ACTION.—No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing."

Placing plaintiff's name upon the unfair list constituted disciplining of plaintiff within the terms of the statute. He alleges that the Union never served him with written specific charges, never gave him a reasonable time to prepare his defense and never afforded a full and fair hearing.

Defendants argue that, because the arbitration proceeding between plaintiff and the employer resort was one

where the specific charge was set forth in a writing signed by plaintiff and the employer, where plaintiff was given a reasonable time to prepare his case and where there was a full and fair hearing, the conditions essential to a disciplinary action were satisfied. The trouble with that argument is that the arbitration proceeding was not a disciplinary proceeding. The object of the arbitration proceeding was to determine a financial dispute between plaintiff and his employer. Neither in any paper in the arbitration proceeding nor in any provision of the Union's constitution or by-laws was it provided that failure to pay the award would result automatically in placing the plaintiff's name upon the unfair list. The placing of his name upon the unfair list was an act of the Union which was not even a party to the arbitration proceeding. Plaintiff's claim is thus one clearly within the purview of the provisions of section 101(a)(5) of the Act.

Defendants say, however, that the action must be dismissed for failure to exhaust the remedies within the Union. Section 101(a)(4) provides in part:

> "*Provided*, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations".

Article XX of the Constitution of the Union entitled "(Claims of Members)" beings as follows:

> "Section 1. Unless the Board or the Executive Committee, upon application made to it in writing by a claimant, grants a waiver from the provisions of this Article, the exclusive remedy of a member who has or asserts a claim against the Association or any of its representatives shall be as follows":

Then follow provisions that the claim must be in writing, must be submitted to certain persons in a certain way and be accompanied by affidavits of witnesses. The section then proceeds:

"(B) Within thirty (30) days after the claim and supporting papers are filed with the Board or the Executive Committee, the Board or the Executive Committee shall set a date for the hearing of the claim, giving the claimant at least ten (10) days' notice of hearing in writing and an opportunity to be personally present to present his evidence and that of his witnesses, if any, at such hearing or hearings. Where the claim is against a representative of the Association, the Board or the Executive Committee shall also give such representative at least ten (10) days' notice of hearing in writing and an opportunity to be personally present and to present his evidence and that of his witnesses. The representative of the Association shall file an answer to the complaint within ten (10) days from receiving a copy of the complaint, together with the affidavits of any witnesses.

Upon the date set for the hearing, the complaint shall be heard. Either party may be represented by counsel of his own selection. The Board of the Executive Committee must make a final determination of the complaint within thirty (30) days after the hearing shall be closed and shall notify the respective parties, in writing, of its decision."

Then follow provisions for a further appeal by notice filed with the National Administrative Secretary not later than thirty days after notice of the making of the decision. Then follows this provision:

"Should any member assert or seek to assert, or enforce a claim in any manner contrary to this Ar-

ticle, * * * the Association, or its representatives, as the case may be, shall have the right to set up, as a complete defense, the remedies provided in this Article, regardless of whether the action or proceeding is in law or in equity in any Court wherein the matter shall be brought."

While, as above stated, it seems clear that the Union has violated plaintiff's rights in disciplining him without a hearing, it is just as plain that the Union has provided in its constitution that he cannot prosecute a claim for violation of those rights in court until he has presented and exhausted that claim within the organization.

These provisions of the Union's constitution are valid except insofar as plaintiff's attempt to exhaust them shall exceed a four-month lapse of time as provided in the excerpt from section 101(a)(4) above quoted. Plaintiff must, therefore, before applying to the United States District Court for relief, prosecute for a four-month period within the organization his claim to have his name removed from the unfair list because of failure of the organization to serve him with written specific charges, give him a reasonable time to prepare his defense and afford him a full and fair hearing.

Defendants' motion for summary judgment dismissing the complaint is granted.

Plaintiff's motion for a temporary injunction is dismissed as moot.

Dated: October 4, 1960

E. J. DIMOCK
United States District Judge

Judgment entered Oct. 4, 1960.
Herbert A. Charlson,
Clerk

Appendix

Applicable Statutes

29 U. S. C. A.

Sec. 411(a)(4). PROTECTION OF THE RIGHT TO SUE.—No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislator: *Provided*, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof: *And provided further*, That no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition.

Sec. 411(a)(5). SAFEGUARDS AGAINST IMPROPER DISCIPLINARY ACTION.—No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for non-payment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

Sec. 412. Any person whose rights secured by the provisions of this title have been infringed by any violation of this title may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located.